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No. 86-1499

In The

Supreme Court of the United States

October Term, 1986

WILLIS MARS EMBERTON and PHYLLIS EMBERTON, dba EMBERTON MACHINE AND TOOL, INC., A California corporation,

Petitioner,

v.

COUNTY OF SAN DIEGO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent COUNTY OF SAN DIEGO, a public entity and a political subdivision of the State of California opposes the petition for a Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate

District, Division One, and files this brief setting forth the reasons for its opposition.[1]

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STATEMENT OF FACTS

On April 24, 1984, petitioner Willis Mars Emberton and Phyllis Emberton, dba Emberton Machine and Tool, Emberton Machine and Tool, Inc. (hereinafter referred to as "Emberton") filed a complaint for refund of personal property taxes on machinery and equipment and injunctive relief against respondents County of San Diego, Board of Supervisors of the County of San Diego, Assessor of the County of San Diego, Auditor/Controller of the County of San Diego, Assessment Appeals Board of the Board of the County of San Diego and Tax Collector of the County of San Diego (hereinafter referred to as "County"). Emberton served his complaint upon County on July 17, 1984. The case was originally filed in the El Cajon Municipal Court. However, on August 6, 1984, County requested transfer to Superior Court in San Diego. On September 26, 1984, after hearing on September 20, 1984, and without opposition or appearance from Emberton, the Court granted transfer of the case.

On August 10, 1984, immediately after requesting transfer, County filed its general denial to the complaint. On June 27, 1985, one year, two months after the complaint was filed and summons issued, County filed its motion to dismiss the complaint pursuant to Revenue and

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[1] Rule 28.1 of the Rules of the Supreme Court is not applicable.

Taxation Code section 5147. On August 2, 1985, the Court granted County's motion to dismiss, issuing its order on August 14, 1985.

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STATEMENT OF THE CASE

Emberton filed suit against County for refund of personal property taxes on April 24, 1984 and served the complaint on July 17, 1984. On August 10, 1984, County filed its general denial to the complaint. Emberton failed to comply with Revenue and Taxaation Code section 5147, requiring the summons to have been issued and served and return made within one year after commencement of the action. On June 27, 1985, County filed its motion to dismiss for failure to comply with Revenue and Taxation Code section 5147, which the Court granted on August 14, 1985.

Emberton appealed the judgment granting dismissal, which was affirmed by the Court of Appeal on September 23, 1986, and certified for publication on October 8, 1986. Emberton petitioned for review by the California Supreme Court, which was denied December 17, 1986.

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ISSUE PRESENTED

Was Emberton denied his constitutional rights when his complaint for tax refund was dismissed for failure to return summons within one year as required by California Law?

———o———

ARGUMENT

I

REVENUE AND TAXATION CODE SECTION 5147 IS NOT UNCONSTITUTIONAL

Emberton contends that Revenue and Taxation Code section 5147 which reads as follows is unconstitutional as a violation of due process and/or equal protection:

> "No such action hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all such actions hereafter commenced must be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any defendant therein unless the summons shall have been issued and served and the return thereon made within one year after the commencement of said action, except where the parties have filed a stipulation in writing that the time may be extended."

The contention is without merit.

As an analogy, similar arguments have been raised with respect to the limitations expressed in previous Code of Civil Procedure sections 581a and 583, and now restated in Code of Civil Procedure section 583.110 et seq. In *Muller v. Coastside County Water Dist.* (1960) 180 Cal. App.2d 712, 713, an appeal was made of the court's order on its own motion dismissing plaintiff's action for failure to serve the summons and complaint within three years after commencement of the action pursuant to section 581a of the Code of Civil Procedure. In *Muller*, it was undisputed that the complaint was filed on December 30, 1955, and that the complaint and summons had not been served

when the court made its order of dismissal on January 12, 1959. The court held that:

> "The appellant's challenge to the constitutionality of section 581a of the Code of Civil Procedure on the grounds that it is unreasonable, discriminatory and violative of due process and the equal protection of the law is frivolous and without substance. Appellant cites no authority for such a proposition nor is any to be found."

In the case of *St. Louis-San Francisco Ry. Co. v. Superior Court* (1969) 276 Cal.App.2d 762, 768-769, the appellant contended that section 583 of the Code of Civil Procedure, requiring a case be brought to trial in three years after a reversal on appeal, was unconstitutional as violating both the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. (*St. Louis-San Francisco Ry. Co. v. Superior Court, supra,* at 768.) The court rejected the due process argument on the basis that the three year period was a reasonable time and counsel failed to demonstrate any reason for his lack of diligence.

The court also held that the dismissal statutes are not unconstitutional on the ground that they deny a plaintiff the right to prosecute actions for protection and preservation of his property. The plaintiff failed to demonstrate where the statute was unreasonable as applied to him or that he was denied an opportunity for a hearing. The court held that the dismissal statutes were a reasonable classification applicable to all litigants and as such, met the test of equality under the same conditions and among persons similarly situated. (*St. Louis-San Francisco Ry. Co. v. Superior Court, supra,* at 769.)

Although Emberton argues that the law is unequally applied, it is simply not true. Rather, Emberton proceeded with a lack of diligence, failing to avail himself of the access provided by law. As stated in *Wood v. Pendola* (1934) 1 Cal.2d 435, 444, "the mere procedure by which jurisdiction is to be exercised may be prescribed by the legislature has been long recognized." This same basic principle was also stated in *Muller v. Muller* (1960) 179 Cal.App.2d 815, 819, repeated by the Court of Appeal in this case and held clearly applicable to Revenue and Taxation Code section 5147. The policy of the state does nothing more than require a plaintiff to proceed with reasonable diligence in the prosecution of an action with the dismissal statutes designed to encourage diligence. (Code Civ. Proc., § 583.130; *General Ins. Co. v. Superior Court* (1975) 15 Cal.3d 449, 454.) Emberton lacked diligence, offered no reason for his lack of action and the matter was dismissed for this reason.

II

REVENUE AND TAXATION CODE SECTION 5147 WAS NOT WAIVED BY COUNTY

Emberton contends that County is estopped or has waived Revenue and Taxation Code section 5147 by its actions. Emberton reaches this conclusion by arguing two points: (1) that County by its conduct, intended to proceed with the trial on the merits; and (2) by waiting approximately two months following the one year period to return the summons and proof of service before filing its motion for dismissal. There is no action on County's part, much less the above two stated, which leads to the conclusions Emberton asserts.

In *Synanon Foundation, Inc. v. County of Marin* (1982) 133 Cal.App.3d 607, the court invoked a waiver to Revenue and Taxation Code section 5147 since the voluntary actions of the defendant indicated "an unequivocal intent to submit the issues to a trial on the merits." (*Id.* at 609.) Not only did the defendants in *Synanon* answer without objecting to plaintiff's failure to make a timely return of summons, they answered interrogatories and complied with requests for production of documents. In addition, when the plaintiff filed his at-issue memorandum, the defendant likewise failed to object. Only after the court set the matter for a trial setting conference did the defendant file its motion to dismiss, nearly two years after plaintiff's noncompliance with Revenue and Taxation Code section 5147. The court concluded that the lengthy delay and the advanced stage of the litigation at the time that the defendant moved to dismiss manifested an intent to have a judicial determination on the merits and the defendant thereby waived its right to pursue a dismissal under Revenue and Taxation Code section 5147.

Here, County filed a general denial and promptly moved for a dismissal under Revenue and Taxation Code section 5147. Emberton made no attempt at discovery and did not file any at issue memorandum. The only action of any type in the case was County's motion objecting to proceeding in the El Cajon Municipal Court. Emberton neither appeared nor filed opposition to the motion and the matter was transferred as requested. Neither the filing of the general denial nor the unopposed motion to transfer are sufficient to justify a finding that County unequivocably intended to proceed with trial on the merits.

This case is analogous to *Ford Motor Co. v. County of Tulare* (1983) 145 Cal.App.3d 688, where the court dismissed an action based upon a failure to comply with Revenue and Taxation Code section 5147. In that case, a general denial had been filed by the defendants. However, the plaintiffs maintained dismissal was improper since the general denial constituted a general appearance. Additionally, plaintiffs contended the existence of implied exceptions for waiver and estoppel precluded dismissal.

In response, the court noted the absence of a general appearance exception to the Revenue and Taxation Code statute. Furthermore, the court found the omission of the exception to be intentional, because a prior draft of the statute had contained such an exception, and stated:

> "Such a holding under the instant facts would amount to a judicial rewriting of the statutory exception contained in section 5147 to add as an additional exception a general appearance by a respondent. The legislative history of section 5147 establishes this is not an exception the Legislature intended in the revenue and taxation area. To so hold in this case would eviscerate the obvious legislative intent." *Ford Motor Co. v. County of Tulare, supra,* 145 Cal.App.3d at 693.

Thus, the general appearances exception was specifically determined not to apply in tax refund actions.

The court also addressed the issue of waiver and estoppel and found it inapplicable. Plaintiff had filed the complaint on December 2, 1980 and service of summons was made on December 9, 1980. Defendant answered the complaint with a general denial on December 27, 1980. The return of summons had not occurred by December 3, 1981. Defendant filed a motion to dismiss pursuant to section

5147 of the Revenue and Taxation Code on December 14, 1981, and the motion was granted by the court on February 23, 1982.

There is no distinction between the present case and *Ford Motor Co. v. County of Tulare, supra,* 145 Cal.App. 3d 688. Certainly, County's motion objecting to El Cajon Municipal Court and requesting the matter be transferred to San Diego Superior Court was not sufficient conduct to conclude a waiver of Revenue and Taxation Code section 5147. Nor is it relevant when the motion to dismiss was filed after the one year statutory period had run. The fact that the motion itself was filed two months after the statutory period ran rather than one day does not change the circumstances that occurred from the date of filing of the complaint to the end of the statutory period for returning the summons to the court or for that matter, to the date of the filing of the motion to dismiss.

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CONCLUSION

Revenue and Taxation Code section 5147 is not unconstitutional and did not deprive Emberton of due process and/or equal protection. Rather, Emberton failed to avail himself of that process which was available and disclosed no facts justifying his lack of diligence in pursuing the matter. Additionally, the one year period of time is a practical procedural consideration and is a reasonable

classification applicable to all litigants. It meets the test of equality under the same conditions and among persons similarly situated. As such, the petition should be denied.

Respectfully submitted,

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DATED: April 9, 1987